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Mr Lawson

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~271.~~ 75

JAMES HENDRICK, PLAINTIFF IN ERROR,

vs.

ARCHIBALD G. LINDSAY AND JAMES P. MANSFIELD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Oct

FILED SEPTEMBER 28, 1874.

Nov 6 1876
Affirmed
Jas Dunn

SUPREME COURT OF THE UNITED STATES.

No. 271.

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James M. Ballantine, dated the thirteenth day of March, 1871, in the penal sum of five thousand dollars, with a condition thereunder written, in substance, that if the said insurance company should prosecute its said suit upon said writ of error to effect, and should answer all damages and costs if it should fail to make its plea good, then the
4 said obligation should be void; else to remain in full force and virtue; which bond was duly filed in the clerk's office of the said circuit court on the 16th day of March, 1871, after having been approved by one of the judges of said court; and thereupon, and by force of the statute in such case made and provided, all proceedings upon the aforesaid judgment were stayed.

5. That thereafter such proceedings were had upon said writ of error that the judgment aforesaid was in all things affirmed, with costs.

6. That the said insurance company failed to pay the said judgment or the costs on affirmance thereof, or any part of said judgment or costs; wherefore these plaintiffs were compelled to pay, and did pay, to the said James M. Ballantine, upon and by reason of their said bond, on or about the seventeenth day of February, 1874, the sum of four thousand four hundred and ninety-seven $\frac{96}{100}$ dollars, being the amount of said judgment, with interest and costs as aforesaid.

7. That the defendant, although often requested, has wholly neglected and refused to pay these plaintiffs the said sum so paid by them, or any part thereof.

II. For a second and separate cause of action the plaintiffs allege, in addition to the allegations contained in the first and second para
5 graphs of the first cause of action—

1. That the said insurance company, desiring to remove said cause to the Supreme Court of the United States by writ of error, and to stay proceedings upon said judgment pending the prosecution of said writ, and until judgment thereon, the defendant, James Hendrick, requested these plaintiffs to execute the bonds required by the statute in such case made and provided, for the purpose of making such writ of error operate as a supersedeas; and promised and agreed, to and with these plaintiffs, that if they would execute such bond, he would, in consideration thereof, whenever requested, furnish them with a good and sufficient bond or bonds of indemnity, satisfactory to these plaintiffs, guarantying and indemnifying them of, from, and against all and all manner of loss or damage which they or either of them should or might sustain by reason of their executing such bond or obligation.

2. That thereupon said insurance company sued out such writ of error, and these plaintiffs, in consideration of and induced by the promise and agreement of the defendant set forth in the last preceding paragraph, did duly execute, under their hands and seals, a certain bond or writing-obligatory of the tenor and effect set forth in the fourth para-
6 graph of the first cause of action herein, which was duly approved and filed as therein set forth; and thereupon, and by force of the statute in such case made and provided, all proceedings upon the aforesaid judgment were stayed.

3. That thereafter these plaintiffs duly requested this defendant to furnish them with a good and sufficient bond of indemnity to the effect specified in the first paragraph of this cause of action, and tendered to him a suitable bond, drawn and ready for execution by him, and requested him to execute the same, or procure the same to be executed by any good and responsible person or persons; but the defendant wholly neglected and refused to execute or furnish any such bond or bonds as promised and agreed by him as hereinbefore set forth.

4. That thereafter such proceedings were had upon said writ of error that the judgment aforesaid was in all things affirmed, with costs.

5. That the said insurance company failed to pay the said judgment or the costs, on affirmance thereof, or any part of said judgment or costs; wherefore these plaintiffs were compelled to pay, and did pay, to the said James M. Ballantine, upon and by reason of their said bond, on or about the seventh day of February, 1874, the sum of four thou-
7 sand four hundred and ninety-seven $\frac{96}{100}$ dollars, being the amount of said judgment, with interest and costs as aforesaid.

III. For a third and separate cause of action, these plaintiffs allege, in addition to the allegations contained in the first paragraph of the first cause of action—

That the defendant being indebted to the plaintiffs on or about the seventeenth day of February, 1874, in the sum of four thousand four hundred and ninety-seven $\frac{96}{100}$ dollars, for money then paid by these plaintiffs for the use of the said defendant, at his request, in consideration thereof, promised these plaintiffs, on the day and year last aforesaid, to pay them the said sum of money, with interest, on request; but that the defendant, although often requested, has not paid the plaintiffs the said sum of money, nor any part thereof, to the plaintiffs' great damage.

THEODORE BACON,
Plaintiffs' Attorney, Rochester, N. Y.

8 (Indorsed:) U. S. circuit court, northern district of N. Y. Archibald G. Lindsay & James P. Mansfield against James Hendrick. Complaint. Theodore Bacon, plaintiffs' attorney, Rochester. Filed March 9, 1874.

9 On the 24th day of March, A. D. 1874, the said defendant, James Hendrick, appeared in said action by J. & J. M. Lawson, as his attorneys, and filed his answer to the said declaration of the said plaintiffs; which said answer was and is in the words and figures following, to wit:

United States circuit court, northern district of New York.

ARCHIBALD G. LINDSAY & JAMES P. MANSfield
against
JAMES HENDRICK.

The above-named defendant, for answer to each and every cause of action set forth in the complaint, herein admits that he, the defendant, is, and was at the time of the commencement of this action, a citizen of the State of New York, and a resident of the city and county of Albany, in the northern district of said State, and the defendant denies each and every allegation in the complaint herein contained, except as hereinbefore specifically admitted.

J. & J. M. LAWSON,
Defendant's Attorneys, 67 State st., Albany, N. Y.

10 (Indorsed:) U. S. circuit court, northern district of N. Y. Archibald G. Lindsay James P. Mansfield against James Hendrick. Answer. J. & J. M. Lawson, deft.'s attys., 67 State st., Albany, N. Y. Filed March 24, 1874.

11 And hereupon the process thereof is continued between the parties aforesaid, of the plea aforesaid, in this same court, before the judges thereof, until the third Tuesday of June, of the term of June, A. D. 1874, at the court-house in the village of Canandaigua, and the issues above joined are ordered by the said court to be tried at the said last-mentioned time and place.

And now at this day, to wit, the third Tuesday of June, of the term of June, A. D. 1874, at the court-house in the village of Canandaigua, before the Hon. Ward Hunt, justice, came the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury summoned to try the said issues being called, also come, who, to speak the truth of the matters aforesaid, being chosen, tried, and sworn, say upon their oaths that the said defendant is guilty in manner and form as the said plaintiffs have above complained against him, and they assess the damages of the said plaintiffs, by reason of the premises, over and above their costs and charges by them about their suit in this behalf expended, to four thousand four hundred and forty-eight dollars and fifty-six cents, and for the costs and charges to six cents.

12 It is ordered by the said court that the defendant have sixty days to make and serve a bill of exceptions, and that in the meantime all other proceedings be stayed.

13 Circuit court of the United States for the northern district of New York, August 11, 1874.

ARCHIBALD G. LINDSAY JAMES P. MANSfield
against
JAMES HENDRICK.

On reading and filing the stipulation of J. & J. M. Lawson, defendant's attorneys, consenting to the entry of such order, on motion of Theodore Bacon, plaintiffs' attorney, it is ordered and directed that the order made upon the trial of this action, staying proceedings herein on the part of the plaintiffs, be vacated as to such stay, and that the plaintiffs be at liberty to proceed herein according to the usual course and practice of this court.

14 (Indorsed:) Circuit court of the United States for the northern district of New York. Archibald G. Lindsay & James P. Mansfield against James Hendrick. Order vacating stay. Filed Aug. 11, 1874.

15 United States circuit court, northern district of New York.

ARCHIBALD G. LINDSAY & JAMES P. MANSfield,
against
JAMES HENDRICK.

It is hereby stipulated that the sum of one hundred and thirteen dollars and seventy-three cents ($113.73) be deducted from the verdict herein, and that when judgment is entered herein it shall be entered for only the sum of four thousand three hundred and thirty-four dollars eighty-three cents, ($4,334.83,) with interest from June the 16th, 1874, and costs.

Dated June 23, 1874.

J. & J. M. LAWSON,
Attys. for Deft.
THEODORE BACON,
Plff. Atty.

16 (Indorsed:) United States circuit court, northern district of N. Y. Archibald G. Lindsay & James P. Mansfield against James Hendrick. Stipulation. Recd. June 24, 1874. Filed Aug. 11, 1874.

17 Therefore it is considered that the said plaintiffs, Archibald G. Lindsay and James P. Mansfield, do recover against the said defendant, James Hendrick, four thousand three hundred and thirty-four dollars and eighty-three cents, with interest thereon from June 16, 1874, amounting to forty-seven dollars and eighteen cents, and also forty-four dollars and seventy-two cents for their costs and charges by this court here adjudged of increase to the said plaintiff, with his assent, which said damages, interest, costs, and charges, in the aggregate, amount to four thousand four hundred and twenty-six dollars and seventy-three cents.

And said defendant in mercy, &c.

Judgment signed this 11th day of August, A. D. 1874.

CHARLES MASON, *Clerk.*

18 (Indorsed:) U. S. circuit court, north. dist. of N. Y. Archibald G. Lindsay James P. Mansfield vs. James Hendrick. Judgment-record. Theodore Bacon, plffs. atty. Damages, $4,334.83; interest, $47.18; taxed costs, $44.72—total, $4,426.73. Filed August 11, 1874, 11 o'clock a. m.

19 In the circuit court of the United States for the northern district of New York.

ARCHIBALD G. LINDSAY & JAMES P. MANSfield
against
JAMES HENDRICK.

Afterwards, to wit, at a session of the circuit court of the United States for the northern district of New York, held at the court-house in the village of Canandaigua, in and for said northern district of New York, on the 16th day of June, 1874, before the honorable Ward Hunt, one of the judges of the Supreme Court of the United States, assigned to hold said circuit court, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of said district summoned to serve in said circuit court, and duly empaneled, twelve good and lawful men of said district, on which day there came as well the attorney on behalf of said plaintiff as the said defendant by his attorney, and the jurors of the jury aforesaid empaneled to try the said issue; and upon the trial of said issue counsel for said plaintiffs, to maintain their said issue, proved—

20 That, on the 27th day of September, A. D. 1870, James M. Ballantine, a citizen and resident of the State of Michigan, and of the eastern district thereof, commenced an action in the circuit court of the United States for the eastern district of Michigan against the Albany City Insurance Company, a citizen and resident of the State of New York, and a corporation duly organized and incorporated under and in pursuance of the laws of said last-mentioned State, by the filing of a declaration setting forth a cause of action amounting to the sum of three thousand five hundred dollars ($3,500) upon a policy of insurance issued by said insurance company to said James M. Ballantine.

That thereafter the said Albany Insurance Company duly appeared n said action by Moore and Griffin, its attorney' in , and joined issue

therein by a plea of the general issue; that the issue so joined came on to be tried at the term of said circuit court of Jan'ary, 1871, before Hon. John Longyear, district judge, sitting as a judge of said circuit court, and a jury; that the said jury upon said trial rendered a verdict in favor of the plaintiff, James M. Ballantine, and against the defendant, The Albany City Insurance Company, for the sum of three thousand four hundred and twenty-five dollars and thirty-five cents, ($3,425.34.)

21 That a judgment was thereupon and on the 7th day of March, 1871, entered in said circuit court in favor of said James M. Ballantine, plaintiff, and against said The Albany City Insurance Company, defendant, for the sum of three thousand four hundred and fifty dollars and sixty-six cents, (being the amount of said verdict and interest thereon,) together with the sum of fifty-nine dollars and eleven cents ($59.11) costs and charges.

That said defendant, The Albany City Insurance Company, thereupon caused a bill of exceptions to be duly made, signed, and filed in said action, and on the 16th day of March, A. D. 1871, duly sued out of the Supreme Court of the United States a writ of error thereon to said circuit court, and duly and in season did, or caused to be done, all the other acts and things necessary to cause said writ of error to operate as a supersedeas, and to give said Supreme Court jurisdiction to review said judgment upon said writ of error and bill of exceptions, according to the laws of the United States and the practice of said court.

That thereupon a return to said writ of error was duly made to said Supreme Court.

That thereafter, at the term of said United States Supreme Court of October, 1873, after argument by counsel for the respective par-

22 ties, it was ordered and adjudged by said Supreme Court that the judgment of said circuit court in said cause be, and the same was thereby, affirmed, with cost and interest, until paid, at the same rate per annum that similar judgments bear in the courts of the State of Michigan, and that the said plaintiff, James M. Ballantine, recover against the said defendant twenty dollars ($20) for his costs therein expended, and have execution therefor; that plaintiff's said costs were therefore duly taxed at twenty dollars, ($20;) that said judgment was thereupon duly remitted to said circuit court for such execution and further proceedings therein as, according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding, and the mandate therefore filed in said circuit court, on the 9th day of February, A. D. 1874.

23 The plaintiffs, further to prove the issue on their part, gave in evidence a bond executed by the plaintiffs to James M. Ballantine, filed with the clerk of said circuit court on the sixteenth day of March, 1871, with the approval and endorsement thereon in the words and figures following, to wit:

Know all men by these presents that we, Archibald G. Lindsay and James P. Mansfield, of Detroit, Wayne Co., Michigan, are held and firmly bound unto James M. Ballantine, of same place, in the sum of five thousand dollars, current and lawful money of the United States of America, to be paid to the said James M. Ballantine, or to his certain attorney, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we jointly & severally bind ourselves, our heirs, executors, and administrators, and each and every of them, firmly by these presents, sealed with our seals, dated the thirteenth day of March, one thousand eight hundred and seventy-one.

The condition of this obligation is such, that whereas lately at Detroit, in said district, in a suit depending in the circuit court of the United States for the eastern district of Michigan, between the said James M. Ballantine, as plaintiff, and the Albany City Insurance Company, of Albany, New York, as defendants, judgment was ren-
24 dered against the said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, therefore, if the said Albany City Insurance Company, defendant, shall prosecute the suit to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

A. G. LINDSAY. [SEAL.]
J. P. MANSFIELD. [SEAL.]

Sealed, signed, and delivered in presence of—
ROSS BROWN.

Approvedby—

JNO. W. LONGYEAR,
District Judge.

(Indorsed:) Bond. Arch. G. Lindsay & to James M. Ballantine. Filed in clerk's office, March 16, 1871. A. Mandell, clerk.

25 The plaintiffs, further to prove the issue on their part, offered in evidence three letters from the defendant to the plaintiff Lindsay, which, it was admitted by defendant's counsel, were sent by the defendant to the plaintiff Lindsay by mail, at the respective dates thereof, and were by said Lindsay received in due course of mail; also, three letters from the plaintiff Lindsay to the defendant, which it was admitted by the defendant's counsel were sent by the plaintiff Lindsay to the defendant by mail at the time of their respective dates, and were received by said defendant in due course of mail, which several letters a*nd* in the words and figures following, to wit:

MARCH 8TH, '71.

A. G. LINDSAY, Esq., *Detroit:*

DEAR SIR: Will you be good enough to sign the needful bail-bond in the "Pask" case, and oblige,

Yours truly,

JAMES HENDRICKS, *V. P.*

26 DETROIT, MICH., *March* 10, 1871.

JAMES HENDRICK, Esq., *Vice-President*:

DEAR SIR: Yours of 8th inst. is recd. and noted, (two letters.) In reply to the one relating to the sch. Reindeer, I beg to say that I will see the owner and ascertain his views; but I believe he has already placed the case in the hands of Messrs. Moore & Griffin for collection. In reply to the second, I beg to say that I will sign the bail-bond in the "Pask" case if you will first furnish me with sufficient security to indemnify me in case of our defeat; the case may be delayed years at Washington, and many changes may occur in that time.

Yours truly,

A. G. LINDSAY.

MARCH 11TH, '71.

A. G. LINDSAY, Esq., *Detroit, Mich.:*

DEAR SIR: Your favor of the 10th inst. duly received and contents noted.

We sent the sch. Minnie Mitchell papers to our adjuster, and
27 he has not as yet let us know the result of his examination. As soon as he does we will advise you.

Yours truly,

JAMES HENDRICK, *V. P.*

Whatever security you desire in the shape of a personal bond, I will give it to you.

J. H.

MARCH 15, '71.

A. G. LINDSAY, Esq., *Detroit:*

DEAR SIR: I have just returned from Boston, and learn that you have not yet advised us of having signed our bail-bond in the "Perk" case. As it ought to be done at once, I hope you will feel that we have, if nothing more, a feeling of old friendship that ought to make men of us in an hour of need.

We have heretofore omitted sending your department any statement because we were $34,000 impaired, whilst your State laws required us to be up within 5 %. We now understand a law is being passed permitting an impairment of 20 %. This, together with the efforts we are making to repair, will enable us to see each other in our proper relations before April 1st.

Yours truly,

JAMES HENDRICK, *V. P.*

28 DETROIT, *March 17th*, 1871.

JAS. HENDRICKS, Esq.,
V. President:

DEAR SIR: Upon receipt of your favor of the 11th inst., I signed your bond in "Perk" case without loss of time, and supposed the fact itself was answer to you in the premises until this a. m. I recd. yours of 15th inst. touching on the same subject, and now ask your pardon for not stating to you at once, upon the receipt of your 11th-inst. favor, that the bond was executed.

Has your adjuster yet reported on the small cargo-claim sch. Minnie Mitchell?

Yours truly,

A. G. LINDSAY.

DETROIT, *Mch. 20th*, 1871.

JAS. HENDRICK, Esq.,
V. President:

DEAR SIR: Inclosed is bond of indemnity, which please have executed and returned to me.

Yours truly,

A. G. LINDSAY.

29 The defendant's counsel thereupon objected to the admission of said letters in evidence, and to the admission of each of them, upon the grounds—

That the request and promise alleged in the declaration was a joint promise and request to both plaintiffs.

That the action could not be maintained upon proof of a request and promise to the plaintiff Lindsay alone.

That the letters furnished no proof of a request by the defendant to the plaintiff Mansfield or to the plaintiffs jointly to become sureties, nor any evidence of a promise by the defendant to indemnify the plaintiff Mansfield or the plaintiffs jointly for becoming sureties; and

That the evidence was improper, immaterial, and irrelevant.

The plaintiff ARCHIBALD G. LINDSAY was then called as a witness on behalf of the plaintiffs, and being sworn, testified as follows:

The plaintiff Mansfield had knowledge of the contents of the correspondence between defendant and myself before we signed the bond.

Thereupon the said objections were then and there overruled by the court, and said letters were admitted and read in evidence, to
30 which ruling and admission of said letters the defendant's counsel then and there duly excepted.

The plaintiffs, further to prove the issue on their part, gave in evidence the draft of a bond which was enclosed and sent to the defendant with the letter bearing date March 20th, 1871, above set forth, which draft-bond was in the words and figures following, to wit:

Know all men by these presents that we, James Hendrick, as principal, and , as surety, of Albany, in the State of New York, held and firmly bound unto Archibald G. Lindsay and James P. Mansfield, of the city of Detroit, county of Wayne, and State of Michigan, in the sum of five thousand five hundred dollars, lawful money of the United States of America, to be paid to the said Lindsay and Mansfield, or to their certain attorneys, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, and each and every of them, firmly by these presents, sealed with our seals, dated the twentieth day of March, one thousand eight hundred and seventy-one.

The condition of this obligation is such, that whereas the said Lindsay and Mansfield have lately, at the request of the said Hen-
31 drick, signed two bonds, one in the sum of $5,000 and one in the sum of $200, in a case pending in the circuit court of the United States for the eastern district of Michigan, in which suit James M. Ballantine was plaintiff and the Albany City Insurance Company was defendant, said bonds being filed for the purpose and intent of taking said case to the Supreme Court of the United States:

Now, therefore, if the said Hendricks shall save and keep the said Lindsay and Mansfield fully indemnified and harmless against all loss, damages, or expenses arising from their giving the said bonds, then the above obligation to be void; and otherwise, in force.

To further prove the said issue on the part of the plaintiffs, the said plaintiff, Archibald G. Lindsay, testified as follows:

I am one of the plaintiffs in this action. I and my co-plaintiff paid certain amounts to Ballantine on the bond. To him we paid four thousand two hundred and fifty dollars and ninety-eight cents, on the bond. We paid one hundred and fifty dollars counsel-fee, for the argument of the case at Washington. Nobody else would pay it, and we paid it to save ourselves.

(The defendant, by his counsel, objected to the evidence as to the payment of the counsel-fee, upon the ground that the plaintiffs were not bound to pay the same by the terms of their bond, and that the
32 defendant was under no obligation to indemnify the plaintiffs against such payment; which objection was sustained, and the court ruled and decided that the plaintiffs could not, upon the evidence, recover the amount paid for such counsel-fee of the defendant.)

Said witness being cross-examined by the defendant's counsel, testified as follows:

Myself and Mr. Mansfield paid this four thousand four hundred and odd dollars about February 17th, 1874. We did not pay cash; we paid it in our notes. I have paid two of my notes. I do not know directly whether Mansfield has paid his notes.

The plaintiffs here rested their case, and the defendant's counsel announced that he had no evidence to offer; and the testimony was thereupon closed, and no other or further evidence was given in the case.

The defendant, by his counsel, thereupon requested the court to charge and direct the jury to find a verdict for the defendant upon the grounds—

First. That there is no evidence that the defendant requested the plaintiffs to become sureties, or promised to indemnify them as alleged in the complaint, and that they cannot, therefore, recover.

Second. That the evidence shows that the request to become surety and the promise to indemnify were a request and promise to the
33 plaintiff Lindsay only; and that, upon such request and promise to one only of the plaintiffs, they cannot recover herein.

Third. That the evidence shows that the plaintiffs joined as sureties in the same obligation; that their claim, if any, is a joint one; that neither can recover unless both are entitled to recover; and that both cannot recover upon a request to become surety and a promise to indemnify made to one only.

Fourth. That there is no sufficient evidence that the defendant ever requested the plaintiffs to execute the bond in question, or any bond which should operate as a supersedeas.

Fifth. That the evidence fails to show that the plaintiffs, or either of them, ever demanded of or notified the defendant to give such security or indemnity as he had promised or was bound to give.

Which request was refused by the court; to which refusal the defendant, by his counsel, then and there duly excepted.

The defendant's counsel then and there further requested the court to charge the jury that the plaintiff Mansfield, having become surety without request from the defendant, and without any promise or indemnity from him, cannot recover.

Which request was refused by the court; to which refusal the
34 defendant, by his counsel, then and there duly excepted.

The defendant, by his counsel, further requested the court to charge the jury that there was no evidence to show that the notes given by the plaintiffs to Ballantine, the obligee in the bond in question, had been received by him in satisfaction of his claim against the plaintiffs or against the insurance company, and that therefore the plaintiffs cannot recover for the amount of such claim represented by such of said notes as remain unpaid.

Which request was refused by the court; to which refusal the defendant, by his counsel, then and there duly excepted.

The court thereupon instructed the jury that the plaintiffs were entitled to recover of the defendant the sum of four thousand four hun-

dred and forty-eight dollars and fifty-six cents, and charged and directed the jury to find and render a verdict in favor of the plaintiffs for that amount; to which charge, instruction, and direction the defendant, by his counsel, then and there duly excepted.

Said jury thereupon found and rendered a verdict in favor of the plaintiffs for the sum of four thousand four hundred and forty-eight dollars and fifty-six cents.

The court thereupon, on motion of defendant's counsel, ordered
35 and directed that the defendant have sixty days to prepare and make a bill of exceptions herein, and that in the meantime all further proceedings herein on the part of the plaintiffs be stayed.

And because none of the exceptions so offered and made to the opinions, instructions, and charge of the said court do appear upon the record of said trial, therefore, on the prayer of the said defendant, by his said counsel, the said judge hath signed this bill of exceptions, according to the statute and rules in such case made and provided, this 14th day of July, one thousand eight hundred and seventy-four.

WARD HUNT,
Ass. Justice Sup. C. U. S.

36,37

38 (Indorsed:) In the circuit court of the United States for the northern district of N. Y. Archibald G. Lindsay & James P. Mansfield against James Hendrick. Proposed bill of exceptions.

SIR: Please take notice that the within is a copy of the "bill of exceptions" proposed in the within-entitled action.

Yours, etc.,

J. & J. M. LAWSON,
Deft.'s Attys.

To THEODORE BACON, Esq., *Plff's. Atty.*
Filed July 14th, 1874.

I admit due and personal service on me of the within proposed bill of exceptions, at Rochester, this 27th day of June, 1874.

THEODORE BACON,
Plaintiffs' Attorney.

39 Circuit court of the United States for the district of Northern New York.

ARCHIBALD G. LINDSAY AND JAMES P. MANSfield
against
JAMES HENDRICK.

Know all men by these presents that we, William A. Young and Samuel N. Bacon, are held and firmly bound unto Archibald G. Lindsay and James P. Mansfield in the sum of nine thousand dollars, ($9,000,) to be paid to the said Archibald G. Lindsay and James P. Mansfield, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated the 12th day of August, 1874.

Whereas the above-named James Hendrick has prosecuted a writ of error to the Supreme Court of the United States to reverse the judg-

ment rendered in the above entitled suit by the circuit court of the United States for the district of Northern New York:

40 Now, therefore, the condition of this obligation is such, that if the above-named James Hendrick shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. A. YOUNG. [L. S.]
SAML. N. BACON. [L. S.]

Sealed and delivered in the presence of—
WORTHINGTON FROTHINGHAM.

UNITED STATES OF AMERICA,
District of Northern New York:

On this 12th day of August, 1874, before me came William A. Young and Samuel N. Bacon, to me personally known to be the persons described in, and who executed, the foregoing bonds, and acknowledged the execution thereof, and the said William A. Young and Samuel N. Bacon, being each by me duly and severally sworn, say, and each for himself says, that he is a resident and householder within said district, and is worth ten thousand dollars over and above all debts and liabilities which he owes or has incurred, and besides his property exempt from levy and sale under execution.

WORTHINGTON FROTHINGHAM,
United States Commissioner, North. Dist. of New York.

Approved by—

WM. J. WALLACE,
Judge U. S. Dist. Court.

14, 42 (Indorsed:) Circuit court of the United States for the district of Northern New York. Archibald G. Lindsay James P. Mansfield against James Hendrick. Bond. Filed Aug. 18, 1874.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Northern New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Archibald G. Lindsay and James P. Mansfield, plaintiffs, and James Hendrick, defendant, a manifest error hath happened to the great damage of the said James Hendrick, as by his complaint appears; we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further

44 to be done therein to correct that error, what of right and according the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said

Supreme Court, the 13th day of August, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the District of Northern New York.

Allowed by—

WM. J. WALLACE,
Judge U. S. District Court.

45, 46 (Indorsed:) Supreme Court of the United States. James Hendrick, pl'ff. in error, vs. Archibald G. Lindsay & James P. Mansfield, defts. in error. Writ of error. I. & J. M. Lawson, attys. for plff. in error, Albany, N. Y. Filed August 18, 1874.

47 UNITED STATES OF AMERICA, *ss:*

To Archibald G. Lindsay and James P. Mansfield, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Northern New York, wherein James Hendrick is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable William J. Wallace, judge of the district court of the United States for the northern district of New York, this 14th day of August, in the year of our Lord one thousand eight hundred and seventy-four.

WM. J. WALLACE,
Judge U. S. District Court.

48 UNITED STATES OF AMERICA,
District of Northern New York:

On this 17th day of August, 1874, personally appeared Henry E. Stern, who, being duly sworn, deposed and said that, on the 15th day of August, 1874, he served upon Theodore Bacon, the attorney for the above-named Archibald G. Lindsay and James P. Mansfield, defendants in error herein, a true copy of the foregoing citation, by delivering the same to and leaving the same with said Theodore Bacon, in person, at the city of Rochester, N. Y.

HENRY E. STERN.

Subscribed and sworn before me this 17th day of August, 1874.
W. FROTHINGHAM,
United States Commissioner.

49, 50 (Indorsed:) Supreme Court of the United States. James Hendrick, plff. in error, vs. Archibald G. Lindsay James P. Mansfield, defts. in error. Citation, &c. I. & J. M. Lawson, attys. for plff. in error, Albany, N. Y. Filed Aug. 18, 1874.

51 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I

have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Archibald G. Lindsay and James P. Mansfield vs. James Hendrick.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, in said district, this 17th day of September, A. D. 1874.

[SEAL.] CHARLES MASON, *Clerk.*

52 Supreme Court of the United States.

JAMES HENDRICK, PLAINTIFF IN ERROR,
against
ARCHIBALD G. LINDSAY AND JAMES P. Mansfield, defendants in error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said James Hendrick, by Amasa J. Parker, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the court improperly admitted in evidence the six letters, copies of which are set forth in said record.

Second. That the court improperly refused to charge and direct
53 the jury to find a verdict for the defendant, as requested by the counsel for the defendant, upon the grounds set forth and appearing in said record.

Third. That the court improperly refused to charge the jury, as requested by the counsel for the defendant—

"That the plaintiff Mansfield, having become surety without request from the defendant, and without any promise of indemnity from him, could not recover."

Fourth. That the court improperly refused to charge the jury, as requested by the counsel for the defendant—

"That there was no evidence to show that the notes given by the plaintiffs to Ballentine, the obligee in the bond in question, had been received by him in satisfaction of his claim against the plaintiffs or against the insurance company, and that therefore the plaintiffs cannot recover for the amount of such claim represented by such of said notes as remain unpaid."

Fifth. That the court improperly instructed, charged, and directed the jury—

54 "That the plaintiffs were entitled to recover of the defendant the sum of four thousand four hundred and forty-eight dollars and fifty-six cents, ($4,448.56,) and that the jury should find and render a verdict in favor of the plaintiffs for that amount."

Sixth. That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Archibald G. Lindsay and James P. Mansfield to have or maintain their aforesaid action thereof against the said James Hendrick.

There is also error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid given was given for the said Archi-

bald G. Lindsay and James P. Mansfield against the said James Hendrick, whereas by the law of the land the said judgment ought to have been given for the said James Hendrick against the said Archibald G. Lindsay and James P. Mansfield; and the said James Hendrick prays that the judgment aforesaid may be reversed, annulled, and altogether
55 held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment, &c.

AMASA J. PARKER,
Attorney for Plaintiff in Error.

(Indorsed:) 1874. October term. No. 523. Supreme Court of the United States. James Hendrick, plff. in error, against Archibald G. Lindsay & James P. Mansfield, defts. in error. Assignment of errors. Filed 28th September, 1874.

(Indorsement on cover:) No. 271. James Hendrick, plaintiff in error, vs. Archibald G. Lindsay and James P. Mansfield. N. New York C. C. U. S. Filed 28th September, 1874.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

James Hendrick, *Plaintiff in Error*
against
Archibald G. Lindsay and James P. Mansfield, *Defendants in Error.*

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

This action comes into this court upon a writ of error to the circuit court for the northern district of New York.

The action was brought by the defendants in error, citizens and residents of the State of Michigan, against the plaintiff in error, a citizen and resident of the State of New York, to recover the sum of four thousand four hundred and ninety-seven dollars, and ninety-six cents ($4,497.96) and interest thereon.

The first count of the declaration (fol. 2 of the error-book,) alleges in substance, that in the month of March, 1871, one James M. Ballentine recovered a judgment in the circuit court of the United States for the eastern district

of Michigan, against the Albany City Insurance Company for the sum of three thousand five hundred and nine dollars and seventy-seven cents ($3,509.77). That said Insurance Company, desired to remove that cause to this court by writ of error, and to stay proceedings thereon, until final judgment. That James Hendrick, the plaintiff in error in this case thereupon requested the defendants in error herein, Lindsay and Mansfield, to execute the bond required by statute to make such writ operate as a supersedeas, and that said Hendrick, in consideration thereof, promised and agreed to indemnify and save harmless, said Lindsay and Mansfield from and against all loss and damage which they might suffer by reason of the execution of said bond. That thereupon such writ of error was sued out by said insurance company, and said Lindsay and Mansfield thereupon, in consideration of, and induced by such request and promise of said Hendrick, executed such bond in the penal sum of five thousand ($5,000) dollars. That said judgment was afterwards upon such writ affirmed by this court. That the insurance company failed to pay the same, and that said Lindsay and Mansfield thereupon were compelled to pay, and did pay to said Ballentine, upon and by reason of said bond, and on or about the 17th day of February, 1874, the sum of four thousand four hundred and ninety-seven dollars and ninety-six cents ($4,497.96), and that the said Hendrick had neglected and refused to pay the same on demand.

The second count (fol. 5 of the error-book) is substantially the same as the first, except that instead of alleging that Hendrick promised to indemnify and save harmless, said Lindsay and Mansfield from the consequences of executing said bond, it alleges that he promised, whenever requested, to furnish them with a good and sufficient bond or bonds of indemnity, satisfactory to them, guaranteeing and indemnifying them against loss or damage by reason of their execution of said bond. That said Hendrick upon request, refused to execute or to procure such bond to be executed, or to furnish the same to said Lindsay and Mansfield.

The third count (fol. 7 of the error-book) is simply an assumpsit for moneys paid, laid out, and expended.

The answer of the defendant (fol. 9 of the error-book) was a general denial.

The cause was tried at a term of the court held at Canandaigua, in said district, on the 16th day of June, 1874, before Mr. Justice Hunt and a jury, and the jury, by the direction of the court, rendered a verdict in favor of the plaintiff, defendants in error, for the full amount claimed.

The only evidence of a request for indemnity by the plaintiffs, or either of them, or of a promise of indemnity by the defendant to the plaintiffs, or either of them, or of any agreement between the parties with reference thereto, is contained in the letters which are set out in the bill of exceptions at folio 25, etc., of the error-book, and are as follows:

March 8, 1871.

A. G. LINDSAY, Esq., Detroit:

DEAR SIR — Will you be good enough to sign the needful bail bond in the "Park" case, and oblige

Yours, truly,

JAMES HENDRICK, *V. P.*

DETROIT, MICH. *March* 10, 1871.

JAMES HENDRICK, Esq., *Vice-President:*

DEAR SIR — Yours of 8th inst. is received and noted (two letters). In reply to the one relating to the sch. "Reindeer," I beg to say that I will see the owner and ascertain his views, but I believe he has already placed the case in the hands of Messrs. Moore and Griffin for collection. In reply to the second, I beg to say that I will sign the bail bond in the "Park" case if you will first furnish me with sufficient security to indemnify me in case of our defeat. The case may be delayed years at Washington, and many changes may occur during that time.

Yours, truly,

A. G. LINDSAY.

March 11, 1871.

A. G. LINDSAY, Esq., Detroit, Mich.:

DEAR SIR — Your favor of 10th inst. duly received and contents noted.

We sent the sch. Minnie Mitchell papers to our adjuster, and he has not as yet let us know the result of his examination; as soon as he does we will advise you.

Yours, truly,

JAMES HENDRICK, *V. P.*

Whatever security you desire in the shape of a personal bond I will give it to you.

J. H.

March 15, 1871.

A. G. LINDSAY, Esq., Detroit:

DEAR SIR — I have just returned from Boston, and learn that you have not yet advised us of having signed our bail bond in the "Park" case. As it ought to be done at once, I hope you will feel that we have, if nothing more, a feeling of old friendship that ought to make men of us in an hour of need.

We have heretofore omitted sending your department any statement, because we were $34,000 impaired, while your State law required us to be up within five per cent. We now understand a law is being passed permitting an impairment of twenty per cent. This, together with the efforts we are making to repair, will enable us to see each other in our proper relations before April 1st.

Yours, truly,

JAMES HENDRICK, *V. P.*

DETEOIT, *March* 17, 1871.

JAS. HENDRICK, Esq., *Vice-President:*

DEAR SIR — Upon receipt of your favor of 11th inst., I signed your bond in "Park" case without loss of time, and supposed the fact itself was answer to you in the premises, until this A. M. I received yours of the 15th inst. touching on the same subject, and now ask your pardon for not stating to you at once, upon the receipt of your 11th inst. favor, that the bond was executed.

Has your adjuster yet reported on the small cargo claim, sch. Minnie Mitchell?

Yours, truly,
A. G. LINDSAY.

DETROIT, *March* 20, 1871.

JAMES HENDRICK, Esq., *Vice-President:*

DEAR SIR — Inclosed is bond of indemnity, which please have executed and return to me.

Yours, truly,
A. G. LINDSAY.

And the only evidence of any damage suffered by the plaintiff by reason of their execution of said bond or of the payment by them of any thing on account thereof, will be found in the bill of exceptions at fols. 31 and 32 of the error-book, and is the testimony of the plaintiff Lindsay, as follows:

I and my coplaintiff paid certain amounts to Ballentine on the bond, to him we paid $4,250.98 on the bond.

Myself and Mr. Mansfield paid this four thousand four hundred and odd dollars, about February 17, 1874; we did not pay cash, we paid it in our notes; I have paid two of my notes; I do not know directly whether Mansfield has paid his notes.

The first exception will be found at folios 29 and 30 of the error-book, and is to the ruling of the court admitting said letters in evidence against the defendant's objection.

And the grounds of objection to their admissibility will be found at folio 29 of the error-book, and are as follows:

That the promise and request alleged in the declaration, was a joint promise and request to both plaintiffs.

That the action could not be maintained upon proof of a request and promise to the plaintiff, Lindsay, alone.

That the letters furnished no proof of a request by the defendant to the plaintiff, Mansfield, or to the plaintiffs jointly to become sureties, nor any evidence of a promise by the defendant to indemnify the plaintiff, Mansfield, or the plaintiffs jointly for becoming sureties.

And that the evidence was improper, immaterial and irrelevant.

The second exception is found at folio 32, etc., of the error-book, and is to the refusal of the court to charge and direct the jury to find a verdict for the defendant upon the following grounds:

First—That there is no evidence that the defendant requested the plaintiffs to become sureties, or promised to indemnify them as alleged in the complaint, and they cannot therefore recover.

Second—That the evidence shows that the request to become surety, and the promise to indemnify, were a request and promise to the plaintiff, Lindsay, only, and that upon such request and promise to one, only, of the plaintiffs, they cannot recover herein.

Third—That the evidence shows that the plaintiffs joined as sureties in the same obligation, that their claim, if any, is a joint one, that neither can recover unless both are entitled to recover, and that both cannot recover upon a request to become surety, and a promise to indemnify, made to one only.

Fourth—That there is no sufficient evidence that the defendant ever requested the plaintiffs to execute the bond in question or any bond which should operate as a supersedeas.

Fifth—That the evidence fails to show that the plaintiffs, or either of them, ever demanded of or notified the defendant to give such security, or indemnity as he had promised or was bound to give.

The third exception is found at folio 33 of the error-book, and is to the refusal of the court to charge the jury:

That the plaintiff, Mansfield, having become surety without request from the defendant and without any promise of indemnity from him, cannot recover.

The fourth exception is found at folio 34 of the error-book and is to the refusal of the court to charge the jury.

That there was no evidence to show that the notes given by the plaintiffs to Ballentine, the obligee in the bond in question, had been received by him in satisfaction of his claim against the plaintiff or against the insurance company, and that therefore the plaintiffs cannot recover for the amount of such claim represented by such of said notes as remain unpaid.

The fifth exception is found at folio 34 of the error-book, and is to the charge of the court, "That the plaintiffs were entitled to recover of the defendant the sum of four thousand four hundred and forty-eight dollars and fifty-six cents ($4,448.56), and directing the jury to find and render a verdict for that amount against the defendant."

POINTS.

FIRST—The court erred in admitting the letters in evidence, as they only showed or tended to show a request from, and a promise to the plaintiff, Lindsay, whilst the promise alleged in the declaration, was a joint request from, and promise to both the plaintiffs.

Allison *v.* Rutledge, 5 Yerger, 193.

SECOND—The court erred in refusing to direct the jury to find a verdict for the defendant upon grounds set forth in the foregoing request for the reason that the request and promise proved, being from and to Lindsay only could not enure to the benefit of, or furnish a ground of action in favor of both the plaintiffs.

The obligation of a surety is to be strictly construed, and is not to be extended to any other subject, or to *any other person*, or to any other period of time than is expressed in the obligation.

Birge on Suretyship, page 40.
Birkhenhead, et al., *v.* George, et al., 5 Hill N. Y. Reports, 634.

Barnes et al. vs Barnes 6 N.Y. 39.

Wade

And in United States *v.* Barcker, recently decided in this court, the court say "nothing can be clearer upon principle and authority than the doctrine that the liability of a surety cannot be extended beyond the terms of his contract; to the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change

in the contract, or that it may be for his benefit. He has a right to stand upon *the very terms* of his contract," and they cite to the same effect :

Miller *v.* Stewart, 9 Wheaton 703.
Ludlow *v.* Simonds, 2 Caines Cases, 1, and Lord Arlington *v.* Merrick, 3d Saunders, 400.

In the case of Grant *v.* Naylor, 4 Cranch 224, this court held that a letter of credit directed by mistake to John and Joseph Naylor, but intended for John and Jeremiah Naylor, and delivered to and acted upon by them would not support an action in favor of John and Jeremiah, and that their case could not be helped by proof that it was in fact intended for them.

See also Bleecker *v.* Hyde, 3 McLean, 279.

In Wright *v.* Russell, 3 Wilson (British R.) 530, it was held that a surety for a clerk to *one* could not be held as a surety to him and his partner taken into the business subsequently.

In Weston et al., *v.* Barton, 4 Taunton 726, it was held that a promise to indemnify five copartners for advances as bankers, would not enure to the benefit of the four survivors for advances made after the death of the fifth.

To the same effect and a similar case is

Strange, et al., *v.* Lee, 3 East. 484.

In the Chancellor, etc., of Cambridge *v.* Baldwin, 5 Mees. and Wels, 580, it was held that a promise to answer for a firm or the *survivors* of them ceased to be binding in case one of the firm *retired.*

In Day *v.* Davey, 2 Perry & Davison, 249, it was held that a guaranty to a firm was terminated by the death of one of the firm.

And in London Assurance Co. *v.* Bold, 6 Adol. & Ellis, N. S., 514, it was held that a promise to answer for one as agent of the company, will not bind to answer for the agent and another with whom he is in partnership in the matters of the agency.

THIRD — The court erred in charging that the plaintiffs were both entitled to recover upon the facts shown, for, even if enough was shown to have entitled the plaintiff, Lindsay, to recover for what he had paid, clearly, it was error under the evidence, and the authorities above cited, to direct a verdict for the plaintiff, Mansfield.

And as the evidence failed to show the amount paid by the plaintiff Lindsay, there was no ground upon which the action could have been severed, and a verdict rendered for him, alone, if that had been allowable.

FOURTH — Under the authorities before cited, the court erred in refusing to charge the jury that the plaintiff Mansfield was not entitled to recover.

FIFTH — The court erred in refusing to charge "That there was no evidence to show that the notes given by plaintiff to Ballentine, had been received by him in payment, or satisfaction of his claim against the defendant, or against the Insurance Company, and therefore the plaintiff cannot recover for the amount of such claim, represented by such of said notes as remain unpaid."

1. To entitle them to recover, the plaintiff's were bound to show a payment and discharge of the liability or debt, for which they were bound, or of some part of it, and they could only recover for so much as they had actually paid or discharged.

   Bonny *v.* Seely, 2 Wend. 482.
   Powell *v.* Smith, 8 John. 248.

2. The giving of one's own note will not operate as payment or discharge of a prior debt or obligatoin, unless it is *expressly* agreed that it shall so operate.

The Kimball, 3 Wall. 37
Downey, ex'r *v.* Hicks, exrx., 14 How. 240.
Drake *v.* Mitchell, 3 East. 250.
Tobey *v.* Barber, 5 John. 68.
Johnson *v*, Weed, 9 John. 309.
Wetherby *v.* Mann, 11 John. 516.
Van Ostrand *v.* Reed, 1 Wend. 424.

And in this case there was no evidence of any such express agreement.

The judgment should be reversed.

MARTIN I. TOWNSEND,
Of Counsel for Plaintiff in Error,
Troy, N. Y

Supreme Court

OF THE

UNITED STATES.

JAMES HENDRICK,
Plaintiff in Error,
vs.
ARCHIBALD G. LINDSAY AND JAMES P. MANSFIELD,
Defendants in Error.

OCTOBER TERM, 1876.

No. 75.

In Error to the Circuit Court of the United States for the Northern District of New York.

BRIEF FOR THE DEFENDANTS IN ERROR.

The bill of exceptions in this case, does not purport to set forth all the testimony in terms. and at length, though substantially it embraces all. Error will not be presumed, and the court cannot infer it. On the contrary, every reasonable intendment will be made in favor of the judgment; and no objection can be taken in the Appellate Court, unless

the facts on which it is alleged to exist shall affirmatively appear on the record.

Chamber's County, vs. Clews, 21 Wallace 324
Peabody, vs. McAvoy, 23 Mich. 526.

On the 27th. day of September, 1870, an action was commenced by James M. Ballentine, against the Albany City Insurance Co., in the Circuit Court of the United States, for the Eastern District of Michigan, to recover an amount alleged to be due upon a policy of insurance. At the January term, 1871, the plaintiff in the suit recovered a verdict upon a jury trial, for the sum of three thousand four hundred and twenty five (3425) dollars and thirty four (34) cents.

On the 7th. day of March, 1871, judgment was entered for the amount of the verdict and costs.

Hendrick, plaintiff in error, was Vice President of that company, and on the 8th. day of March, 1871, he wrote to the defendant in error, Mr. Lindsay, as follows:

"A. G. Lindsay Esq.,
"Detroit,
"Dear Sir,
"Will you be good enough
"to sign the needful bail bond in the "Park case" and oblige
Yours Truly,
James Hendrick V. P."

Folio 25.

On the 10th. day of March, 1871, Lindsay wrote a letter addressed to him as vice president, as follows:

"I beg to say that I will sign the bail bond in the "Park case" if you will first furnish me with sufficient security to indemnify me in case of our defeat, the case may be delayed years at Washington and many changes may occur in that time."

On the 11th. day of March, 1871, Hendrick wrote to Lindsay at Detroit acknowledging the receipt of the letter of the 10th and saying:

" *Whatever security may be desired* in the shape of a personal bond I will give it to you."

Folio 27.

After the receipt of this letter, the defendants in error, Lindsay and Mansfield, executed to Mr. Ballentine their joint and several bond, which was accepted and approved by the Circuit Court of the United States for the eastern district of Michigan, and which was filed in that court on the 16th day of March, 1871, on which day a writ of error was sued out by the Albany City Insurance Company, from this court; and by which, and in virtue of said bond, the judgment of said Circuit Court was superceded.

On the 15th of March, 1871, Hendrick wrote to Mr. Lindsay at Detroit, saying as follows :

"I have just returned from Boston, and learn that you have not yet advised us of having signed our bail bond in the "Park" case. As it should be done at once, I hope you will feel that we have, if nothing more, a feeling of old friendship, that ought to make men of us in an hour of need."

Folio 27.

On the 17th of March, Mr. Lindsay wrote to Mr. Hendrick, addressing him as Vice President, and saying :

"Upon receipt of your favor of the 11th inst, I signed your bond in "Park" case without loss of time, and supposed the fact itself was answer to you in the premises until this A. M. I rec'd yours of the 15th inst., touching on the same subject, and now ask your pardon for not stating to you at once, upon the receipt of your 11th inst. favor, that the bond was executed.

Folio 28.

It thus appears that the bond was given *in reliance upon the undertaking and promise contained in Hendrick's letter of the 11th of March.*

On the 20th day of March, Mr. Lindsay wrote to Mr. Hendrick as follows :

"Dear Sir:—Enclosed is bond of indemnity, which please have executed and returned to me."

Folio 28.

The bond enclosed is found on page 9 of the record. It

is in the ordinary form of a bond of indemnity, to be executed by James Hendrick, as principal, with a blank for sureties, and recites that Lindsay *and Mansfield*, the defendants in error, had, at the request of Hendrick, signed the bond theretofore described, to supersede the judgment against the insurance company.

The plaintiff in error was thus advised of what had been done. He never expressed any dissent. He never executed the indemnifying bond, but left it to the sureties upon the judgment bond to pay not only the judgment upon affirmance, but also counsel fees for arguing the case in this court; and he now seeks to reverse the judgment of the Circuit Court of the United States for the Northern District of New York, by which he was held liable upon his written promise and obligation to give security to those who, on his request, assumed the position of surety to stay the execution of the judgment against the insurance company.

POINTS.

I.

There was sufficient evidence upon the trial to show that the notes given by the plaintiffs to Ballentine, the obligee, in the bond in error, had been received by him in satisfaction of his claim against the plaintiffs, or against the insurance company, so as to entitle the plaintiffs to maintain their action.

In *Wetherbee vs. Mann, 11 Johnson, 518*, an action was brought on a special agreement to indemnify; and it was there held that, where a party gave a negotiable note, in satisfaction of a judgment, and occupied the position of the surety, he might maintain an action against his principal, although there had been no satisfaction entered on the record, and the note still remained unpaid.

See also, Rodman vs. Hedden, 10 Wendell, 501.
Elwood vs. Deifendorf, 5 Barb., 410.
Van Ostrand vs. Reed, 1 Wend., 430.

Mr. Lindsay testified as follows:

"I and my co-plaintiff *paid* certain amounts to Ballentine on the bond. To him we paid $4,250.98 on the bond." He farther testified: "Myself and Mr. Mansfield paid this four thousand four hundred and forty odd dollars about February 17th, 1874. We did not pay cash. We *paid* it in our notes. I have paid two of my notes. I do not know directly whether Mansfield has paid his note."

Folios 31 and 32.

It is not pretended that any of the notes are in fact unpaid; and the testimony not only constructively, but directly states that the judgment was paid. In the case of

Van Ostrand vs. Reed, 1 Wend., 430,

The court say: "There are cases, no doubt, where the giv-"ing a negotiable promissory note is equivalent to the pay-"ment of money. Thus, where a surety gave his own note, "which was received in satisfaction of the debt of the prin-"cipal, the surety recovered the amount of the note, as so "much money paid for the use of the principal."

II.

The promises of Hendrick to indemnify, under tne circumstances, entitles Lindsay and Mansfield to maintain their action.

No question can be made as to Lindsay's right to sue individually, if he so chose.

The bond to Ballentine was joint and several.

Therefore Lindsay alone might have been sued on it; or, he might severally have paid it and discharged it; or, if Mansfield contributed to its payment, the latter might have assigned his claim to Lindsay.

In either case, if Lindsay had sued as sole plaintiff on the promise to indemnify, there is no pretense that Hendrick could have defended against *him*.

Again, if the security, involved in the promises of Hen-

drick to give a bond of indemnity, should be held to have been given to Lindsay alone, and to indemnify him against the joint liability of himself and Mansfield, then the latter is entitled to it, and the security enures to the benefit of both.

Elwood vs. Deifendorf, 5 Barb.. 398.
1 Story's Eq. Jur. Section 499, and case cited in note.

It results from the above, that to sustain the judgment rendered in the court below, is simply to prevent circuity of action.

For, if it should be reversed on the ground that this action could not be sustained in the names of both the plaintiffs, there is no legal bar to an action by Lindsay alone, as the bond given to stay the execution was several as well as joint.

But this agreement, properly construed, sustains the joint action, and such action was properly brought.

It is fairly inferable, that Lindsay requested Mansfield to become one of the sureties, and that the latter did so in reliance upon the undertaking and promise of Hendrick to furnish security.

Lindsay testifies (page 9):

"The plaintiff, Mansfield, had knowledged of the contents of the correspondence between the defendant and myself before we signed the bond."

Moreover, it appears that Hendrick knew that Mansfield had joined in the bond.

See Lindsay's Letter of 20th March, (page 8).

His *object* was to have the execution on the judgment against the company stayed, through the agency of Lindsay.

The law requires that the security in such a case shall be satisfactory to the judge approving it. The party to the suit need not sign it, and in this case did not unite in it. Mr. Lindsay *procured* such bail in error as satisfied the circuit judge, and complied with Mr. Hendrick's wish and request to stay the collection of the judgment against the insurance company; and he did this in reliance on the promise of Hen-

drick to give *whatever security he desired* in the shape of a personal bond.

A *reasonable construction* of this undertaking by Hendrick is, that he would indemnify the sureties on the bond, as furnished or procured by Lindsay.

Promises of this character (to indemnify or guarantee) are to be construed liberally in favor of the party accepting them.

This is a question of the *construction* of the instrument creating the obligation, and is distinct from the question of an attempt to extend the surety's liability beyond his undertaking, as properly construed.

The rules of construction applicable to guarantees and other contracts of sureties are stated in the case of *Gates vs. McKee, 13 New York, 232*, in which reference is made to several decisions of this court.

In the case of *Nash vs. Towne, 5 Wallace, 699*, it is said, "Courts, in construction of contracts, look to the language "employed, the subject matter, and the surrounding circum- "stances, and may avail themselves of the same light which "the parties enjoyed when the contract was executed. They "are accordingly entitled to place themselves in the same "situation as the parties who made the contract, in order "that they may view the circumstances as those parties "viewed them, and so judge of the *meaning of the words*, "and of the correct application of the language to the things "described."

Is there any doubt of what the parties *intended* in this case? Can there be any question as to the sense in which Mr. Lindsay understood the undertaking of Mr. Hendrick, and that Mr. Hendrick *knew* that Mr. Lindsay so understood it and acted upon that understanding?

Is it not demonstrated that Mr. Hendrick availed himself of the action of Mr. Lindsay, founded npon such an understanding, and reaped the benefit of such action?

Referring to the rules and construction and interpretation of contracts, as collected by *Parsons on Contracts*, in the first

chapter of the second volume, we insist that there is not a single principle opposed to our construction of Hendrick's undertaking.

It does not appear what relation Hendrick sustained to the insurance company, beyond that he was its vice-president, and spoke of the bail bond as "our bond," and appealed to Lindsay upon the feeling of old friendship. (See his letter of March 15th, 1871, page 8.

It is not necessary that the considerntion should have moved to him. It is enough that the plaintiffs made undertakings and sustained losses through reliance on the promise made by him.

See U. S. vs. Lynn, 15 Peters 290, and the cases cited by counsel in the very full argument of that case, on pages 302, 307; and by the court, on pp. 313, 314.

The counsel for Hendrick, in the court below, seem to have placed much reliance on the fact that Mansfield's name was not mentioned in the letters of Hendrick, and, therefore, that Mansfield could not sue npon the promise.

In answer to this, we say:

1st. This action in *assumpsit* is to be distinguished from an action of *covenant* or upon a *speciality*. There is a distinction arising out of the form of action.

2nd. Although Mansfield's name was not mentioned, yet if the promise and undertaking of Hendrick was intended to inure to the benefit of any person or persons whom Lindsay might procure to sign the bail bond, then such person or persons can, at common law, sue directly and in his or their own name, in *assumpsit*.

See Chitty on Contracts, 54 to 58, and cases cited.

A promise made to one person for the benefit of another, although no consideration moves from such other person, entitles the latter to sue directly upon it in his own name.

This doctrine, and the cases to sustain it, will be found in *1st Parsons on Contracts, section 15, chap. 1, book 2.*

This doctrine is fully examined and stated in the case of *Carnegie vs. Morrison, 2 Metcalf 381.*

On page 396, it is held that the same instrument may constitute a contract between the original parties, and also between one or both of them, and others, who may subsequently become interested in its execution; and "that the law, operating upon the acts of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."

In the case of *Barclay vs. Lucas*, 3 *Douglass 321*, (same case in note to 1st Term R., p. 291,) it is held, that the *intention* of the parties should govern the court in making their decision; and that the bond given in that case to a partnership, enured to the benefit of partners who came into the firm after its date and delivery, and that they might sue on it in their names jointly with the partners who constituted the firm when the bond was given, on the principle that the security was intended to apply to and reach the transactions of the firm.

The analogy between the principles of that decision and those involved in this case, is obvious.

In the case of *Erickson vs. Compton, 6th Howard (N. Y.) 471*, it is said; "There is no inconsistency between a con-"tract in the name of one person, and the fact that another "is entitled to the benefit of it."

Finally, passing by the question whether according to the strict rules of *common law* practice, this action was properly brought in the joint names of Lindsay and Mansfield, it is plain that the laws of New York authorize, if they don't require, this form of this procedure.

The practice, pleadings and forms and modes of proceeding in civil cases, other than, equity and admiralty causes, in the Circuit Courts of the United States, must conform as near as may be, to the practice, pleadings, forms and modes of proceeding, existing at the time in like causes, in courts of record in the State within which such Circuit Court is held.

U. S. Revised Statutes, Sec. 914.

The New York Statute, (Sec. 111 of code,) declares that

every action must be prosecuted in the name of the *real party* in interest, excepting as otherwise provided in section 113.

Section 113 provides that, "An executor or administrator, a trustee of an *express* trust, or a party expressly authorized by statute to sue, *may* sue, without joining with them the parties for whose benefit the action is prosecuted."

The result of this congressional legislation is that the form and general practice in New York was adopted as to making parties in suits at law.

As to the New York practice, the rule is thus expressed: "The former chancery practice is now adopted as to making "parties."

Brownson vs. Gifford, 8 Howard (N. Y.) 389.
Hollenback vs. VanValkenburg, 5 Howard (N. Y.) 281.
See also 5th Howard (N. Y.) 99.

If the plaintiff, Lindsay, had sued as a trustee of an express trust, (which he is not under the code,) he could, though entitled to sue alone, have joined Mansfield with him as the beneficiary, if he had elected so to do.

Considerant vs. Brisby, 22 N. Y., 389, 392, 397.

On general principles, applicable to parties in chancery proceedings, it is plain that Mansfield had such an interest as to make him a proper if not a necessary party.

We have before shown that he was interested in the indemnity, and that, if Lindsay had enforced it in his own name, Mansfield could have compelled a contribution.

In fact, if Lindsay had sued alone upon the undertaking, without joining Mansfield, we think the complaint would have been demurable for such reason. But it is not necessary to discuss this point.

The act of Congress makes it *obligatory* upon the courts of the United States to conform in their modes of proceeding to the law of the State in which the suit is brought.

Sears vs. Eastburn, 10 Howard, 189.

On the whole case we claim that the attempted defence is as devoid of foundation in law as in ethics.

W. A. MOORE,
For Defendant in Error.

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